Supreme Court of the United States

OCTOBER TERM, 1944

No.799

SAFEWAY STORES, INCORPORATED, *Petitioner,*

v.

CHESTER BOWLES, Price Administrator.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion (R. 84) of the United States Emergency Court of Appeals was rendered on November 29, 1944, and is not yet reported.

II

JURISDICTION

The judgment of the Emergency Court was entered on November 29, 1944. (R. 88.) The jurisdiction of this Court is invoked under Section 204(d) of the Emergency Price Control Act of 1942, 56 Stat. 31, 50 U. S. C. Appx. §924(d).

III

STATEMENT OF THE CASE

A full statement of the case has been given under heading "A" of the Petition (pp. 1-6 herein) and it is incorporated here by reference.

IV

SPECIFICATION OF ERRORS

1. The Emergency Court erred in entering a judgment dismissing the complaint.

2. The Emergency Court erred in holding that the Administrator was warranted in refusing to accept the industry recommendation for a single-price ceiling.

3. The Emergency Court erred in holding that the Administrator was justified in imposing a 4% rollback on Groups 3 and 4 stores which had a 1941 meat department sales margin of 19% or less.

4. The Emergency Court erred in failing to find that the rollback imposed by the Administrator was without any substantial basis and was unconstitutionally discriminatory.

V

QUESTIONS PRESENTED

The primary questions presented are—

(1) Whether the Administrator acted arbitrarily or capriciously in not establishing a single-price ceiling for meats at the retail level.

(2) Whether the Administrator may, arbitrarily and without substantial basis, impose a 4% rollback from the established meat ceiling prices for Groups 3 and 4 stores which had a 1941 meat department sales margin of 19%

or less or whether such action is unconstitutionally discriminatory.

(3) Whether the interpretation placed by the Emergency Court upon the review provisions of the Act render them ineffective and offend against the due process clause of the Fifth Amendment.

VI

STATUTORY PROVISIONS INVOLVED

The only statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. Appx. §901 et seq. The provisions thereof, insofar as pertinent to the questions here presented, follow:

> "Sec. 2. (a) . . . the Price Administrator . . . may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, . . . Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order, and shall give consideration to their recommendations. . . ."
>
> "Sec. 204. (a) . . . Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: . . .
>
> "(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. . . ."

VII

SUMMARY OF ARGUMENT

Point 1. The Administrator, contrary to the intention of Congress, failed and refused to give due consideration to the practical recommendation of representative members of the retail meat industry that there be a single ceiling price established at the retail level.

Point 2. The Administrator adhered to academic and statistical studies, unrelated to price control, for guidance, and evolved a new classification of stores (within Groups 3 and 4) based upon a 1941 sales margin of 19% realized in the meat department of each store, and then imposed a 4% rollback upon all of those stores which were on the unfavored side of the 19% line of demarcation. This was done without substantial basis and was therefore arbitrary, capricious and contrary to the ruling of this Court.

Point 3. The imposition, without any substantial basis, of a price rollback upon chain stores and large ($250,000 gross sales) independents which realized, in 1941, a 19% or less meat sales margin while permitting all other stores to charge the established ceiling prices, is not only arbitrary and capricious within the meaning of the Act but it is also unconstitutionally discriminatory in violation of the due process clause of the Fifth Amendment. However, instead of setting aside the regulation, the Emergency Court disregarded the arbitrary nature thereof on the ground that the over-all price structure was not shown to be generally unfair and inequitable. In order to make such a showing it would be necessary, according to the lower court, to show that the regulation is unfair and inequitable in its application to a *major* portion of the industry. The obvious impracticability of presenting such a showing makes the court's interpretation a bar to any effec-

tive review, and it therefore makes a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

VIII

ARGUMENT

Point 1. The Administrator Arbitrarily and Capriciously Ignored the Recommendation of Representative Members of the Industry that there be but One Price Ceiling for Meat at the Retail Level.

The Emergency Price Control Act, as it was originally passed in 1942, provided (Section 2(a)) that "Before issuing any regulation or order . . . the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order." Obviously, Congress would not have inserted that provision if it had not intended that the Administrator should pay some attention to the recommendations of industry when he found it "practicable" to "advise and consult" with representatives thereof. However, apparently because of the Administrator's failure to heed industry recommendations even when they were before him, Congress, by the amendatory Act approved June 30, 1944, 58 Stat. 632, clarified the foregoing provision by adding thereto this specific admonition: "and shall give consideration to their recommendations."

Significantly, in the statement of the considerations involved in the issuance of Amendment No. 3 imposing a 10% rollback only on large stores belonging to very large chain organizations no mention was made of any consultation with representative members of the industry. But on August 13, 1943, Amendment No. 3 was issued, and after petitioner's protest was filed, a meeting of representative members of the industry was held at the Office of Price Administration. That meeting unanimously approved a

resolution declaring that the classification of stores based upon the volume of sales and/or type of ownership should be abandoned, and that a single ceiling price should be established for each grade of meat at the retail level so that the consuming public might be protected in time of scarcity while permitting the forces of competition to operate in time of plentiful supply.[5] (R. 36.) This was and still is pure business sense, based upon practical experience.

Although the Administrator specifically admits (Answer, R. 81) that the foregoing recommendation for a single ceiling price was made he at no point states that consideration was given thereto. However, he does casually observe (R. 46) that "a single maximum price for all retail stores would have been unfair to the industry." And he then seeks to explain: "Thus a single price for some stores offering many services and for large self-service stores would be either so high that larger stores would enjoy unprecedented margins, with a consequent increase in prices to the consumer, or so low that it would make continued operation by the small service store impossible." Such a statement, accepted at face value by the lower court (R. 86), disregards not only the considered, practical recommendation of industry representatives, but also the established fact that the forces of competition invariably control within a maximum limit. Of course, scarce items might be sold at the maximum price by some stores which otherwise would sell at a lower price, but when the items are scarce the chances are that the store which is compelled to sell at the lower price will not have its proportionate

[5] Two months previously, at a meeting of representatives of the wholesale and retail food industry, including both chains and independents, large and small, held in Washington upon the invitation of the Price Administrator, detailed recommendations were adopted including one for the establishment of a single ceiling price. (See Record, pp. 291-3 in Docket No. 798, being another petition filed in this Court today by Safeway Stores, Incorporated.)

supply of the scarce items. This is shown by the present record: petitioner received only 70% of the meat supply permitted by Government quota allowances. (R. 6, 17-18.)

There are very practical reasons why, in times of scarcity, the low-cost retail distributor does not receive a fair proportion of available supplies. For example, in the case of beef, the regulations (MPR 169) establish ceiling prices which vary according to type and method of distribution. Packers and slaughterers, when selling fabricated cuts, are in a position to secure a higher price for beef than when they sell in carcass form. Quantity discounts also have a tendency to discourage the flow of beef to direct-buying (low-cost) retailers because they customarily purchase beef in carcass form in *carload* lots. The regulations provide a differential between carload and less-than-carload purchases, and this provision, during times of scarcity, diverts available supplies of beef to distributors of small quantities because of the additional compensation obtainable from them. It is only natural that packers and slaughterers should be inclined to make the maximum possible sales first through channels affording the greater return.

Furthermore, even in the case of scarce items, if a store which normally sells at reduced prices should take advantage of the period of scarcity and increase the prices of the scarce items it would have an immediate ill effect upon the good will of customers and would tend to divert them to the stores which normally sell at maximum prices. Therefore, the few normally low-cost stores which might take advantage of a period of scarcity to charge the maximum prices could not reasonably be said to constitute an inflationary threat.

Although the Administrator, after his conference (R. 26, 49, 66) with representative members of the industry, and after considering (R. 40) petitioner's protest, became con-

vinced that the 10% rollback imposed upon the large stores in the very large chain organizations was ill advised, he apparently was unwilling to relinquish his hold upon his academic theory of some sort of store classification. Therefore, while reducing the rollback to 4% he retained the theory of a price differential based upon a store classification, but he made the amount of the 1941 meat department sales margin the determining factor. Of course, he wholly ignored the specific recommendation of representative members of the industry that there be a single ceiling price at the retail level. Such disregard may only be characterized as arbitrary and capricious.

Point 2. The Administrator Arbitrarily and without any Substantial Basis Imposed a 4% Rollback on Groups 3 and 4 Stores which had a 1941 Meat Department Sales Margin of 19% or Less.

When the Administrator modified MPR 355 by issuing Amendment No. 10 he did not grant the relief requested by petitioner but only decreased the amount of the rollback imposed. True, he also changed the classification of stores, but petitioner is still penalized because it is a chain organization and because some of its stores realized a 1941 meat margin of not more than 19%. (In order to continue its established single-price policy it must also apply the rollback to substantially all of its stores which had a 1941 meat sales margin of more than 19%.) It is not made applicable to independent stores which had a 1942 sales volume of less than $250,000 (Group 1 and 2 stores), regardless of the 1941 margin realized on meat department sales. It is also inapplicable to all stores, regardless of sales, whose gross 1941 margin on meat exceeded 19%.

Therefore, the regulation in its amended form does not affect hundreds of petitioner's competitors (Group 1 and 2 stores) who are in a comparable sales volume category

(according to 1942 figures) with the majority of petitioner's stores. Nor does it give effect to the aforementioned recommendation of representative members of the industry that the Administrator abandon any classification of stores based upon sales volume and/or type of ownership.

Apart from the Administrator's apparent insistence that some sort of store classification must be imposed in spite of recommendations of industry to the contrary, he seems to be subject to sporadic theories as to the method of classifying. Initially, according to his own statement (R. 58), he had five classes in mind; then he decided to combine the first two, thus leaving the four groups above mentioned at the time of the issuance of MPR 355. This regulation not only combined Group 1 with Group 2, and Group 3 with Group 4, but it made a new class composed of chain stores with a 1942 sales volume of $250,000 or more belonging to an organization which did a 1942 gross business of $40,000,000 or more. Then came Amendment 10 with a modification of the new classification based upon the 1941 margin on meat department sales and including all chain stores having a 19% margin or less and all independents with such margin that had a 1942 sales volume of $250,000 or more.

The determination to classify stores in the first place for the purpose of regulating prices seems to have been motivated by various studies, academic and otherwise, none of which was for the purpose of controlling prices or any other business practice. They were made by "governmental agencies and private institutions such as schools of busines administration and business research firms." (R. 46-7.) They were for purely academic or statistical purposes or for the use of such persons as marketing analysts, credit managers, and investment bankers.

The academic basis for the Administrator's store classification theories may be illustrated by the importance which he attaches to the *definition* of a "supermarket", and his statement that "Other definitions indicate the fundamental importance of large annual sales volume as marking a distinct category of selling unit." (R. 47.)

Until the issuance of MPR 355 the Administrator made sales volume, rather than the service rendered the customer, the only factor in determining the classification into which both independent and chain stores were placed. If the independent had a 1942 sales volume of less than $250,000 it was placed in Group 1 or Group 2 depending upon which side of the $50,000 sales volume line it fell; otherwise it was placed in Group 4. If the chain store had a 1942 volume of less than $250,000 it was automatically placed in Group 3, otherwise in Group 4. By Amendment 10 to MPR 355, the Administrator for the first time created a classification based upon a sales margin. Whereas *sales volume of all commodities* was the determining factor for the classification of all stores, and so continued for most purposes, by Amendment 10 the Administrator used a new and special method, namely, the 1941 *sales margin* on *meat only*, to classify stores for the purpose of the rollback on meat.

The arbitrary and theoretical nature of the sales margin method in conjunction with the existing over-all sales volume classification is shown in cases where, for example—

> (a) One of petitioner's stores had a 1942 sales volume of $240,000 and a 1941 meat department sales margin of 19% and competes with a nearby independent or chain store which had a 1942 sales volume of $200,000 and a 1941 meat department sales margin of 23%. Petitioner's store would be required to reduce its meat prices 4% below the maximum otherwise permitted whereas its competitor would be allowed to

sell at the maximum. This would be true even though petitioner's annual sales volume had in the meantime decreased to $220,000 and its competitors had increased to $260,000. In other words, the competitor would be permitted maximum prices regardless of a substantially increased sales volume over 1942, while petitioner, whose volume may have substantially decreased during the same period, would be forced to apply the 4% rollback.

(b) One of petitioner's stores had a 1942 sales volume of $150,000 and a 1941 meat department sales margin of 18% (due to competitive conditions and the desire to increase volume in that particular store), while a nearby chain or independent store had a 1942 sales volume of $500,000 and a 1941 meat department sales margin of 21%. The competitor is not required to apply the 4% rollback, but it is made applicable to petitioner. Due to wartime conditions and the shortage of meats it is impossible for petitioner to continue to operate profitably on an 18% basis but it is nonetheless required to roll back the maximum prices 4%, whereas the competitor may continue on the old basis.

(c) One of petitioner's stores was, prior to the regulation in question, on substantially an even competitive basis with a nearby store, each of them having had a 1942 sales volume of more than $250,000 and virtually the same sales margin, namely, a 19% margin in the case of petitioner's 1941 meat department sales, and 19½% in the case of the competitor. The competitor, whether he be an independent or a member of a chain, may continue to charge maximum prices, but petitioner, because its 1941 margin was ½% lower, is forced to charge 4% less than the maximum permitted its competitor.

The foregoing illustrative cases, while hypothetical, are indicative of many similar conditions in the industry and are only logical in the course of changing conditions.

Even though petitioner had submitted scores of actual instances, similar to those above set forth, the Administrator would probably have contended that they were not general throughout petitioner's organization (unless the great majority of petitioner's more than 2,300 stores were proved to be so situated) and, even though they were, he would have sought the protection of the catch-all defense that the conditions shown were not indicative of conditions throughout the industry and that petitioner had, therefore, failed to prove that the regulation "is not generally fair and equitable for retail sellers of meat generally". Indeed, that is substantially the position taken by the lower court, which thus imposes upon petitioner a burden which admittedly could never be carried—a burden which was not envisioned by the Congress and which is repugnant to all rules of reason.

This Court, in *Yakus v. United States*, 321 U. S. 414, 423, 88 L. ed. 653, 659, referred to the objective of, and the standards prescribed by, the Price Control Act and stated:

> ". . . It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that *the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.*" (Emphasis supplied.)

Thus, this Court holds that there must be a "substantial basis" for the Administrator's findings, rather than a mere "summary statement of the basic facts" which the Emergency Court has interpreted the Act as requiring. See *Montgomery Ward & Company v. Bowles*, 138 F. (2d) 669, 671.

The "statement of considerations", which Section 2(a) of the Act requires the Administrator to make, were held

by this Court, in the *Yakus* case, to play an important part in making possible a proper appraisal of the Administrator's actions.[6] It is, therefore, important to note the statements which he issued in connection with the regulations here involved.

In the statement of the considerations involved in the issuance of Amendment No. 3 to MPR 355 imposing a 10% rollback upon retail meat prices established for the stores belonging to the large chain organizations merely refer to "further surveys made by the Administrator" as a basis for his finding that the 10% rollback was proper. (R. 64.)

In the statement of considerations involved in the issuance of Amendment No. 10 to MPR 355 whereby the 10% rollback was reduced to 4% and imposed on all chain stores and also the large (Group 4) independents, the Administrator merely stated that he had "reviewed the original data" and "obtained some new data on margins", from which sources he found that the original reduction of 10% was too great and did not cover independent stores which operated on as low margins as the large chains, but that 4%, applied to all Group 3 and 4 stores, would permit margins "approximately the same as they observed in the past". (R. 66.)

It is submitted that neither of these statements affords that "substantial basis" which this Court has held to be necessary to support the Administrator's findings, and that his imposition of the 4% rollback upon those chain and large independent stores on the wrong side of the 19% line of demarcation was and is arbitrary and capricious.

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[6] This Court stated (321 U. S. 426, 88 L. ed. 661):

> "The *standards* prescribed by the present Act, *with the aid of the 'statement of considerations'* required to be made by the Administrator, *are sufficiently definite and precise* to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. . . ." (Emphases supplied.)

Point 3. The Interpretation of the Emergency Court makes the Price Control Act Unconstitutionally Discriminatory and Renders the Review Provisions Ineffective in Violation of the Due Process Clause of the Fifth Amendment.

We have seen how the Administrator has discriminated against petitioner by imposing upon it a 4% rollback from the established ceiling prices without according the same treatment to the great majority of petitioner's competitors; also why, during a period of scarcity, the low-cost retail distributor like petitioner does not even receive its proportionate share of available supplies, thus enhancing the discrimination practiced by the Administrator. If the Price Control Act should be held to authorize any such injuriously discriminatory and arbitrary action by the Administrator it would violate the due process clause of the Fifth Amendment. *Currin v. Wallace*, 306 U. S. 1, 14, 83 L. ed. 441, 450; *Detroit Bank v. United States*, 317 U. S. 329, 337, 87 L. ed. 304, 311. An interpretation of the Act to that effect is, of course, equally offensive.

The question of due process under the Price Control Act was presented in *Yakus v. United States*, supra. This Court examined the provisions of the statute and came to the conclusion that "the authorized procedure is *not incapable* of according the protection to petitioners' rights required by due process."[7] A part of the "authorized

[7] This Court stated (321 U. S. 434, 88 L. ed. 665):

> "For the purposes of this case, in passing upon the sufficiency of the procedure upon protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. *Action taken by them is reviewable in this Court and if contrary to due process will be corrected here.* . . . But upon a full examination of the provisions of the statute it is evident that the authorized procedure *is not incapable* of according the protection to petitioners' rights required by due process." (Emphases supplied.)

procedure" is contained in Section 204 providing for the review by the Emergency Court of actions of the Administrator denying protests against price regulations. Under subsection (b) a regulation shall be set aside if it be "not in accordance with law, or is arbitrary or capricious." Therefore, if the Administrator act arbitrarily, as he did in this case, the court must set aside the regulation, or the part thereof, in question.

Here the court found there was no showing that the overall price structure was not "generally fair and equitable" and so *disregarded the arbitrary features thereof.* This is in accordance with its opinion expressed in *Philadelphia Coke Company v. Bowles,* 139 F. (2d) 349, 355, that a regulation is valid unless it is unfair and inequitable in its application to a "*major* portion of the industry." In other words, it is insufficient if petitioner disclose arbitrary features of a regulation even though they be injuriously discriminatory to a substantial segment (but not a major numerical part) of the industry. The obvious impracticability of having the majority of the members of any industry join in presenting such a showing makes the court's interpretation a bar to any effective review, and it therefore makes a mockery of the due process provided by the Act and guaranteed by the Fifth Amendment.

IX

CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers in order that both the substantive and procedural provisions of the Emergency Price Control Act, as amended, may be given the effect intended by Congress and required by the Constitution; and that to such

end a writ of certiorari should be granted, and that this Court should review the judgment of the United States Emergency Court of Appeals and finally reverse it.

Respectfully submitted,

ELISHA HANSON,
ELIOT C. LOVETT,
Counsel for Petitioner,
729 Fifteenth Street, N. W.,
Washington 5, D. C.

December 29, 1944.